RECENT DECISIONS.

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AGENCY—UNAUTHORIZED ACT OF AGENT—RATIFICATION BY RETENTION OF BENEFITS.—The defendant's agent borrowed money without authority, and the court inferred from the testimony that the money was expended for the benefit of the defendant. Until the due bill which the agent had given was presented for payment, the defendant was ignorant of this. *Held,* the defendant was estopped to deny the agent's authority. *Wall* v. *The Chelsea Plantation Club* (S. C. 1911) 70 S. E. 434.

On these facts it is difficult to discover any foundation for an estoppel, and in similar cases the authorities usually rest the principal's liability on ratification. Huffcut, Agency § 30; *Bacon* v. *Johnson* (1885) 56 Mich. 182. Thus where the principal has in his hands the avails of his agent's act and declines to relinquish them, the rule ordinarily is that he has ratified the transaction and is therefore accountable for its accompanying liability, since he cannot be permitted to take its benefits and shirk its burdens. *Bristow* v. *Whitmore* (1861) 9 H. L. Cas. 391; *Huttig Door Co.* v. *Gitchell* (1897) 69 Mo. App. 115. Though the principal's knowledge of the essential facts is in general a prerequisite of ratification, Huffcut, Agency § 37; *Sill* v. *Pate* (1907) 230 Ill. 39, proof thereof may be dispensed with when the principal's conduct shows an intention to ratify regardless of the facts. Huffcut, Agency § 37; *Fitzmaurice* v. *Bayley* (1856) 6 E. & B. 868; see *Kelly* v. *Newburyport R. R. Co.* (1886) 141 Mass. 496. It would seem, however, that the doctrine thus broadly stated is subject to qualification. Intention is an essential of ratification. Huffcut, Agency §§ 31, 33; *Merritt* v. *Bissell* (1898) 155 N. Y. 396. Where the principal declines to return the avails of the agent's unauthorized acts, having an opportunity to do so, it is not an unreasonable inference that he intends to ratify them. But where the principal has unwittingly profited by the transaction and on discovering the facts is no longer in a position to return its fruits, it is not reasonable to hold that by merely declining to place the third party in *statu quo* he has evinced an intention to ratify the unauthorized act. It seems that the plaintiff in the principal case should, therefore, have sought relief in another form of action. See Keener, Quasi-Contracts 113, 116; *Luther* v. *Wheeler* (1905) 73 S. C. 83.

APPEAL AND ERROR—DIRECTION OF VERDICT—CONTRADICTORY TESTIMONY.—In an action of tort for personal injuries the plaintiff had testified that as the car started she tried to get hold of the door, but could not. On the second trial she testified that when thrown she was holding to the door. Thereupon a verdict was directed for the defendant. *Held,* the trial court correctly disposed of the cause in view of the inconsistency of the plaintiff's testimony. *Smith* v. *Boston Elevated Ry. Co.* (C. C. A. 1st C. 1911) 184 Fed. 387.

It is frequently said that whenever a judge would set aside a verdict for one of the parties, he may direct a verdict for the other. *Penn. R. R. Co.* v. *Martin* (1901) 111 Fed. 586; *Thompson* v. *McConnell* (1901) 107 Fed. 33. Since a judge has the power to set aside a verdict which

he thinks unjustified by the evidence, there appears no reason of convenience of sufficient weight to make this a desirable rule of practice, *Aiken* v. *Holyoke St. Ry. Co.* (1901) 180 Mass. 8, as it is not only in theory a serious encroachment on the right to trial by jury, but is also in fact prejudicial to the party against whom the verdict is directed. *McDonald* v. *Metropolitan St. Ry. Co.* (1901) 167 N. Y. 66; *Mt. Adams Inclined Ry. Co.* v. *Lowery* (1896) 74 Fed. 463. While the question is greatly confused, the correct rule would seem to be that the court should direct a verdict only when the evidence introduced by the party on whom the *onus* of proof rests would be insufficient as a matter of law to establish his case, even though it were true. *Dublin W. & W. Ry. Co.* v. *Slattery* (1878) L. R. 3 App. Cas. 1155; *Mt. Adams Inclined Ry. Co.* v. *Lowery supra.* Nor, in the absence of admissions, is a directed verdict proper because evidence, legally sufficient if true, is uncontradicted by any evidence introduced in rebuttal, for a determination of the credibility of witnesses lies solely within the province of the jury. *Gannon* v. *Gas Co.* (1898) 145 Mo. 502. For the same reason, the mere fact that in the course of the same or successive trials a witness, whether a party to the suit or not, makes contradictory statements as to certain facts in controversy, furnishes no ground for a withdrawal of the case from the jury. *Pacific Biscuit Co.* v. *Dugger* (1902) 42 Or. 513; *C. & A. R. R. Co.* v. *Jennings* (1905) 217 Ill. 494; *cf. Davis* v. *Wakelee* (1895) 156 U. S. 680. It therefore seems that the facts of the principal case did not warrant the court's approbation of the action of the trial judge.

BANKRUPTCY—ILLEGAL PREFERENCES—FORM OF ACTION FOR RECOVERY.—The plaintiff, a trustee in bankruptcy, sued at law to recover the value of property transferred to the defendant by the bankrupt within the four months' period. The case was transferred to the equity side of the court and there tried against the plaintiff's objection. *Held,* the case should have been tried at law. *Allen* v. *Gray* (N. Y. 1911) 94 N. E. 652.

In New York, when a money judgment only is demanded, a case like the present is properly triable only at law. Code Civ. Proc. § 968; *Mayer* v. *Stern* (N. Y. 1904) 99 App. Div. 427. In the absence of statute, however, it would seem that equity has inherent jurisdiction of such suits on the ground of fraud, *Wall* v. *Cox* (1900) 101 Fed. 403, even where no relief is asked beyond the recovery of a definite sum of money. *Mason* v. *Nat. County Bank* (1908) 163 Fed. 920; *Parker* v. *Black* (1906) 143 Fed. 560, aff'd 151 Fed. 18. It is true that the trustee is now afforded remedies at law, *Cohen* v. *Small* (N. Y. 1907) 120 App. Div. 211, aff'd 190 N. Y. 568, and they should be available whether the transfer has been effected by a written instrument or not, since in other cases of voidable conveyances the aid of equity is not required. See *Bool* v. *Mix* (N. Y. 1837) 17 Wend. 119; *cf. Dyer* v. *Kratzenstein* (N. Y. 1905) 103 App. Div. 404. But the legal remedy must be regarded as an expansion of the common law in emulation of chancery, see *Bean* v. *Brookmire* (1871) Fed. Cas. 1169, and the jurisdiction of equity should therefore remain intact irrespective of the present adequacy of these remedies. 1 Story, Eq. Jur. § 64-*i; cf. Warmath* v. *O'Daniel* (1908) 159 Fed. 87. The argument that for equity to entertain such suits is to deprive the defendant of the right to a jury trial, *Bank* v. *Blakey* (1905) 166 Ind. 429, is not applicable to cases in which the defendant had no such right

when the constitution was adopted. See *Toplitz* v. *Bower* (N. Y. 1898) 26 App. Div. 126. In the absence of statutory provisions, therefore, the trustee should be allowed freely to elect his remedy, *Bean* v. *Brookmire supra,* a principle as well recognized under the Act of 1867, making such conveyances void, as under the present Law by which they are merely voidable. *Goodenow* v. *Milliken* (1871) Fed. Cas. 5535; *cf. Garrison* v. *Markley* (1872) Fed. Cas. 5256; *Houghton* v. *Steiner* (N. Y. 1904) 92 App. Div. 171. The principal case, therefore, reaches a result sound on common law principles, although the code provision would seem to render a different conclusion impossible.

BANKRUPTCY—PARTNERSHIP—RIGHTS OF CREDITORS OF A PARTNER TO PROCEED AGAINST FIRM ASSETS.—The plaintiff, a creditor of a bankrupt partner whose firm was also bankrupt, sought to prove two claims against the firm. As regards the first, the partner had given a deed of trust of land belonging to him individually to a bank as security for certain firm notes which it held. Failing to realize the amount of the notes from a sale of the land, the bank proved the debt against the firm. A portion only of the *pro rata* dividend to firm creditors was sufficient to satisfy the remainder of the bank's claim. The second claim was upon a debt due from the firm to the partner. *Held,* as to the first claim, the partner's estate was entitled to be subrogated to the bank's rights against the firm, and the plaintiff should therefore succeed, but as to the second, though the debt might be proved, the plaintiff could not receive a dividend upon it until after all firm creditors had been paid. *In re Effinger* (D. Md. 1911) 184 Fed. 728. See Notes, p. 569.

BANKRUPTCY—PROCEEDINGS IN STATE COURT—REVIEW BY BANKRUPTCY COURT.—The defendant company sought to foreclose in a state court a mechanic's lien on the bankrupt's realty which it attached when suit was brought. The Federal court in which bankruptcy proceedings were begun more than four months later, after having stayed this suit, permitted it to be prosecuted to judgment and then upon the petition of the trustee in bankruptcy reviewed the record of the action sufficiently to determine that it was fairly conducted. *Held,* the bankruptcy court did not exceed its powers. *Hobbs* v. *Head & Dowst Co.* (C. C. A. 1st C. 1911) 184 Fed. 409.

Upon the filing of a petition in bankruptcy all property in the possession of the bankrupt of which he claims ownership passes into the custody of the bankruptcy court which may not only draw to itself the determination of all controversies over the possession of such property, *In re Schermerhorn* (1906) 145 Fed. 341, but may also restrain parties from continuing suits in a state court instituted within four months prior to the bankruptcy proceedings. *In re Dana* (1909) 167 Fed. 529; *In re Russell* (1900) 101 Fed. 248. Indeed, the Bankruptcy Act of 1898, § 11, does not deny the court's power to stay a suit instituted before the four months' period. Judicial decisions, however, seem to deprive the bankruptcy court of this power in such a case whenever the state court is in possession of the property that is the subject of the litigation, see *Metcalf* v. *Barker* (1902) 187 U. S. 165, on the theory that principles of comity demand that under such circumstances the state court proceed without interference. *Peck* v. *Jenness* (1849) 7 How. 612. Therefore, although in the principal case the bankruptcy court accepted the result reached in the state

court after revewing the face of the record, and under the facts such a review was perhaps desirable, see *In re Hornstein* (1903) 122 Fed. 266, and even justifiable under a broad construction of § 2 (15), inasmuch as the power of review to be effective must necessarily be accompanied by the right to restrain, the action of the court would seem questionable. See *Pickens* v. *Roy* (1902) 187 U. S. 177; *Eyster* v. *Gaff* (1875) 91 U. S. 521.

CARRIERS—DISCRIMINATION—BAGGAGE TRANSFER PRIVILEGES.—The defendant granted to one Eagle the privilege of going upon its trains to solicit baggage for his wagons, refusing the plaintiff a like privilege. *Held,* the plaintiff was not entitled to any relief. *Dingman* v. *Duluth S. S. & A. Ry. Co.* (Mich. 1911) 130 N. W. 24.

If a carrier is bound to furnish its passengers with facilities for transportation from its station, see *Kates* v. *Atlanta Baggage & Cab Co.* (1899) 107 Ga. 636, this requirement can be met through the instrumentality of a competent agent, see *Chicago etc. R. R. Co.* v. *Pullman Car Co.* (1891) 139 U. S. 79, for if the public are satisfactorily served it is immaterial who serves them. See *Express Cases* (1886) 117 U. S. 1. Where no duty to the public exists the carrier may grant exclusive privileges. *Fluker* v. *Georgia Railroad* (1889) 81 Ga. 461. Accordingly, it is generally conceded that a carrier may bestow upon a transfer company the exclusive right to enter its stations and trains to solicit patronage, *Donovan* v. *Pennsylvania Co.* (1905) 199 U. S. 279; *Kates* v. *Atlanta Baggage & Cab Co. supra; State ex rel.* v. *Union Depot Co.* (1905) 71 Oh. St. 379, although it is obvious that it may not discriminate against the private conveyances of its passengers. *Griswold* v. *Webb* (1899) 16 R. I. 649; *Summitt* v. *State* (Tenn. 1881) 8 Lea 413. Through a confusion of this right of the passenger or his agents with the claims of baggage companies, it has occasionally been denied that a carrier may license one company to solicit in its station to the exclusion of others, *State* v. *Reed* (1898) 76 Miss. 211; *Kalamazoo Hack & Bus Co.* v. *Sootsma* (1890) 84 Mich. 194, and in support of this view it has been contended that the contrary rule would subject a helpless public to extortion. *Montana W. Ry. Co.* v. *Langlois* (1890) 9 Mont. 41; 15 Harv. L. Rev. 59. The force of this contention is weakened by the fact that if the carrier is under a duty to furnish such facilities it must furnish them at a reasonable rate, see *Donovan* v. *Pennsylvania Co. supra,* and in the absence of this duty the carrier may use its premises as it chooses. *Fluker* v. *Georgia Railroad supra.* However, there is no such conflict as to the question raised by the principal case, since it is clear not only that a carrier is under no duty to furnish the public with the means of checking baggage on its trains, but also that the convenience of the public is best subserved when this service is rendered through a single agency. *Lewis* v. *Weatherford etc. Ry. Co.* (1904) 36 Tex. Civ. App. 48.

CARRIERS—DISCRIMINATION UNDER THE INTERSTATE COMMERCE ACT—FORWARDING AGENTS.—In order to prevent forwarding agents from taking advantage of the difference between carload and less-than-carload rates the defendant restricted the former to shipments actually owned by the consignor or the consignee, and required forwarding agents to pay the less-than-carload rates. *Held,* the rule was dis-

criminatory within the meaning of § 2 of the Interstate Commerce Act. *Interstate Com. Com.* v. *D. L. & W. R. R.* (1911) 31 Sup. Ct. Rep. 392.

Although a common carrier was originally under no obligation to serve all without discrimination however unjust, see *Great Western Ry. Co.* v. *Sutton* (1869) L. R. 4 Eng. & Ir. App. 226, a carrier engaged in interstate commerce is now required to make similar charges for like service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. The Interstate Commerce Act, § 2. In interpreting this section it has been established that, in addition to the cost of service, all circumstances and conditions which reasonably affect matters of carriage may be considered by the carrier in fixing its rates. *T. & P. Ry. Co.* v. *I. C. C.* (1896) 162 U. S. 197; *I. C. C.* v. *B. & O. Ry. Co.* (1892) 145 U. S. 263; see also *Denaby Colliery Co.* v. *Manchester Ry. Co.* (1885) L. R. 11 App. Cas. 97. It seems manifest, however, that since the purpose of the section was to prohibit discrimination as between shippers, see *Wight* v. *U. S.* (1897) 167 U. S. 512, to make ownership of the consignment the test by which charges should be measured would be to defeat that very purpose. The decision of the principal case to this effect seems not only to accord with the general tendency to require a public service company to extend the same facilities to a competitor as to any other member of the public, in so far as it may do so and retain control of its system, 10 COLUMBIA LAW REVIEW 557; *Great Western Ry. Co.* v. *Sutton supra;* but see *Johnson* v. *Dominion Express Co.* (1896) 208 Ont. 203, but also to give full effect to the Interstate Commerce Act, although it subjects shippers to discrimination at the hands of forwarding agents since they are not under public control. See *California Comm. Ass'n* v. *Wells, Fargo & Co.* (1908) 14 I. C. C. Rep. 422; *Export Shipping Co.* v. *Wabash R. R. Co.* (1908) 14 I. C. C. Rep. 437; *Detroit Ry. Co.* v. *I. C. C.* (1896) 74 Fed. 803.

CONTRACTS—CONSTRUCTION—RIGHT OF INSURANCE AGENT TO RENEWAL COMMISSIONS.—The plaintiff, whose contract stipulated that he was to receive a percentage of the renewal premiums on policies which he should write "as long as he could collect them," claimed commissions on renewal premiums paid after a lawful termination of the agency. *Held,* the plaintiff could not recover. *Walker* v. *John Hancock Mut. Life Ins. Co.* (N. J. 1911) 79 Atl. 354.

When the agent's right to renewal commissions is expressly limited by contract to the duration of the agency, a termination of the agency ends all such rights. *Stagg* v. *Insurance Co.* (1870) 10 Wall. 589; *King* v. *Raleigh* (1902) 100 Mo. App. 1. It is equally clear that the right to future renewal commissions will survive the agency if it is so provided, *Fudickar* v. *Guardian Life Ins. Co.* (1875) 62 N. Y. 392, but when the contract is silent as to this point, the cases are not in accord. The usual construction of such contracts seems to be that the agent's rights are confined to the period of the agency. *Insurance Co.* v. *Williams* (1884) 91 N. C. 69; *Mills* v. *Insurance Co.* (1899) 77 Miss. 327; but see *Hale* v. *Brooklyn Life Ins. Co.* (1890) 120 N. Y. 294. Upon principle, if the renewal commissions are given as compensation for procuring the policy, the moment it is issued the agent acquires a legal right to them, conditioned upon their collection, *Hercules Mut. Life. Assur. Soc'y* v. *Brinker* (1879) 77 N. Y. 435, and the cause of

the termination of the agency is immaterial. On the other hand, if the renewal commissions are given as compensation for additional services to be rendered by the agent, such as making collections, the right to the commissions should not survive the agency. Therefore, for purposes of construction, a distinction should be made between cases where the agent is to render services other than writing policies, and cases where no additional services are to be performed. *Cf. Hercules Mut. Life Ass. Soc'y* v. *Brinker supra.* In the principal case, since the duty of collecting premiums was expressly imposed upon the agent, it is fair to assume that the renewal commissions were to be given in return for this service, and it follows that when the agency was lawfully terminated, the agent's right to commissions ceased.

CORPORATIONS—EXTRAORDINARY DIVIDENDS—CAPITAL OR INCOME.—Certain shares of corporate stock were left in trust, the net income to be paid to the respondent for life, upon her death the principal of the trust fund to go to her son. A dividend of fifty per cent was declared, one-half was paid in cash, one-half in further shares of the corporate stock. *Held,* the cash dividend went to the life tenant. *Newport Trust Co.* v. *Van Rensselaer et al.* (R. I. 1911) 78 Atl. 1009.

A testator appointed his son trustee of bank stock with the direction that the income thereof was to go to his daughter during her life, at her death the stock to be divided between her children. *Held,* an extraordinary dividend of stock should be added to the *corpus* of the trust estate. *Jackson* v. *Maddox et al.* (Ga. 1911) 70 S. E. 865. See Notes, p. 556.

CORPORATIONS—INSOLVENCY—PREFERENCE TO DIRECTORS.—A director of a corporation loaned money to it while it was a going concern. For security he was given a mortgage which was renewed after its insolvency. *Held,* this was a valid preference to the director. *Harle-Haas Drug Co.* v. *Rogers Drug Co.* (Wyo. 1911) 113 Pac. 791. See Notes, p. 561.

CORPORATIONS—RECEIVERS—JURISDICTION OF EQUITY.—The plaintiff, a minority stockholder of a solvent corporation, filed a bill in equity for the appointment of a receiver and its dissolution on the ground of fraud and gross mismanagement. *Held,* three judges dissenting, a receiver should take charge of the corporation until equitable management was assured, although the court could not order its dissolution. *Ashton et al.* v. *Penfield et al.* (Mo. 1911) 135 S. W. 938.

Since a corporation was originally regarded as exercising delegated functions of the state, its dissolution could be effected only by a state officer in an action at law, see *Atty.-General* v. *Utica Ins. Co.* (N. Y. 1817) 2 Johns. Ch. 371, and in the absence of statute this is still the rule, *Strong* v. *McCagg* (1882) 55 Wis. 624, although the reason for the rule is no longer of great force. See 4 Thompson, Corporations § 4539; *cf. Cox* v. *Volkert* (1885) 86 Mo. 505. In many of the States, however, courts of equity are empowered to decree the dissolution of corporations by statutes, for the most part strictly construed, *Wheeler* v. *Pullman Iron Co.* (1892) 143 Ill. 197; *French Bank Case* (1879) 53 Cal. 495, but even in the absence of statute in many instances courts of equity have extended their jurisdiction to the appointment of receivers not only in case of insolvency, *Towle* v. *American Bldg. Soc.*

(1894) 60 Fed. 131, but also in the case of going concerns where, by reason of serious internal dissension, *Jasper Land Co.* v. *Wallis* (1898) 123 Ala. 652, or fraudulent management, it is indispensable for the adequate protection of stockholders, *Ponca Mill Co.* v. *Mikesell* (1898) 55 Neb. 98; *Haywood* v. *Lincoln Lumber Co.* (1885) 64 Wis. 639, or creditors, *D. A. Thompkins Co.* v. *Catawba Mills* (1897) 82 Fed. 780, care being taken to exercise the supervision to the smallest possible extent. See *Wallace* v. *Publishing Co.* (1897) 101 Ia. 313. A few courts even assert the power of equity to wind up the affairs of the corporation and distribute its assets in extreme cases, see *Sellman* v. *German Union Fire Ins. Co.* (1909) 184 Fed. 977; *contra, Neall* v. *Hill* (1860) 16 Cal. 145, stopping short, however, of legal dissolution. But see *Miner* v. *Belle Isle Ice Co. supra; Arents* v. *Blackwell's Tobacco Co.* (1900) 101 Fed. 338. This extension of the jurisdiction of equity to meet new conditions was therefore applied with sound conservatism by the court in the principal case.

CORPORATIONS—STOCKHOLDER'S ACTION—ACQUISITION OF STOCK AFTER THE ACCRUAL OF THE CAUSE OF ACTION.—The plaintiff, a stockholder of the defendant corporation, sued in behalf of the company for the benefit of himself and all other stockholders to set aside an improper transaction consummated at the expense of the corporation before he acquired his stock. *Held,* the action could be maintained. *Pollitz* v. *Gould et al.* (N. Y. Ct. of App. 1911) 45 N. Y. L. J. No. 30.

Since the corporation as an entity may redress its wrongs only at the suit of its officers, when the officers refuse to act equity allows a single stockholder to institute suit, *Filder* v. *London Ry. Co.* (1863) 1 Hem. & M. 489; *Brewer* v. *Boston Theatre* (1870) 104 Mass. 378, and thus to set in motion the machinery of the court, 3 Pomeroy, Eq. Jur. (3rd ed.) § 1095, in order to protect the stockholders, the real parties in interest, and to prevent a failure of justice. Morawetz, Private Corporations (2nd ed.) §§ 237, 238. The cause of action, however, is not that of the shareholder, though the value of his stock may have fallen, *Niles* v. *N. Y. C. & H. R. R. R. Co.* (N. Y. 1902) 69 App. Div. 144, aff'd 176 N. Y. 119, but that of the corporation to which the benefits of the suit enure in the first instance although in the action it appears as a nominal defendant. *Appleton* v. *American Malting Co.* (1903) 65 N. J. Eq. 375. Accordingly, if it is manifest that the plaintiff is acting as the puppet of an outside interest, he has no standing in court. *Forster* v. *Manchester Ry. Co.* (1861) 4 De G. F. & J. 126. Corporate rights are thus enforced by virtue of the interest which every shareholder has in having the corporate wrongs redressed. But since a stockholder whose acquiescence in the wrong has disqualified him from representing the company is, nevertheless, given a share in the fruits of the action, see Morawetz, Private Corporations (2nd ed.) § 262, this interest would seem to be an incident of the ownership of the stock which remains unaffected by the personal disability of its holder to sue in behalf of the corporation. *Winsor* v. *Bailey* (1875) 55 N. H. 218. It accordingly follows, as the principal case decides, that one who acquires stock after the consummation of the wrong, should be allowed by reason of his ownership to protect this interest in the absence of personal disqualification. *Winsor* v. *Bailey supra;* but see *Home Fire Ins. Co.* v. *Barber* (1903) 67 Neb. 644.

COVENANTS—RESTRICTIVE COVENANT BY TENANT IN FAVOR OF STRANGER—SURRENDER OF LEASE—LIABILITY OF SUBSEQUENT LESSEE.—A lessee of two shops sold his interest in one to the plaintiff, covenanting not to use the other as a butcher's shop. At the instigation of the defendant who knew of the covenant, he surrendered the lease of the second shop to his landlord, from whom the defendant immediately leased it. *Held,* since the landlord had constructive notice of the covenant, equity would enjoin its violation by the defendant. *Wilkes* v. *Spooner* (1910) 104 L. T. 140.

Whatever the interest acquired by one in lands whose use is restricted by a covenant of which he is the recipient, *Peck* v. *Conway* (1876) 119 Mass. 546; *In re Nisbet & Potts' Contract* L. R. [1906] 1 Ch. 386, it would be destroyed, together with all other interests created by a lessee in his term, upon surrender of the lease, were it not for the fact that as to third persons who have rights in the leased premises, surrender operates not as an extinguishment of the term, *Mellor* v. *Watkins* (1874) L. R. 9 Q. B. 400; *Davenport's Case* (1611) 8 Co. Rep. 144, but as an assignment of the lease to the lessor. *Piggott* v. *Stratton* (1859) 1 De G. F. & J. 33; *Doe* v. *Pyke* (1816) 5 M. & S. 146; *Bailey* v. *Richardson* (1885) 66 Cal. 416. Since, however, during the continuance of the lease the landlord has no interest in the estate of his lessee, it would seem that in the transaction resulting in surrender he occupies the position of a mere stranger. Accordingly, in the absence of circumstances to put him on his guard, no reason appears for imputing to him knowledge of the covenant, for notice of a covenant in a deed not forming part of a vendor's chain of title cannot be imputed to a purchaser of that title. *Carter* v. *Williams* (1870) L. R. 9 Eq. 678. Since the principal case discloses no facts upon which to predicate constructive notice, it follows that the property had passed to an innocent purchaser and was therefore no longer burdened by the covenant, *Carter* v. *Williams supra,* even though subsequently conveyed to a purchaser with notice. 1 Williams, Vendor and Purchaser 430. The result, however, might be properly based on the ground that the defendant was implicated in the fraud which attended the surrender of the lease, 1 Perry, Trusts (5th ed.) § 222, had the injunction been limited to the unexpired portion of the surrendered term.

DAMAGES—BREACH OF WARRANTY—MITIGATION OF DAMAGES.—Damages for the breach of a warranty of efficiency were assessed at the price of new engines substituted for those supplied by the appellant, who excepted on the ground that as the purchase of the new engines would have been a pecuniary advantage to the respondent even had the warranty been complied with, the damages should be nominal merely. *Held,* this contention was unsound. *British Westinghouse Mfg. Co.* v. *Underground Ry. Co. of London* (1911) 104 L. T. 105.

The measure of damages for a breach of contract is *prima facie* the entire loss incurred, *Dalbeattie Steamship Co.* v. *Card* (1893) 59 Fed. 159, so far as it results naturally from the breach. *Hadley* v. *Baxendale* (1854) 9 Ex. 341. Accordingly the legal damage from a breach of warranty is ordinarily the value of the article as warranted less its actual value, 3 Page, Contracts § 1592; *Heenan* v. *Redman* (1901) 101 Ill. App. 603, or, where the goods can be made to conform to the warranty, the cost of altering them. *Board of Education* v. *Jaeger* (1901) 67 N. J. L. 39; *Hitchcock* v. *Hunt* (1859) 28 Conn. 343.

This *prima facie* standard is qualified by the rule that the injured party can recover only those damages which with reasonable endeavor he could not have prevented. *Miller* v. *Mariner's Church* (Me. 1830) 7 Greenl. 38; *Hamilton* v. *McPherson* (1863) 28 N. Y. 72. Thus in the principal case the vendor was chargeable only with the cost of the new engines, a sum less than would otherwise have accrued. The courts, however, adhere to the doctrine that damages are to be assessed with reference to the time when the cause of action arose, *Joyner* v. *Weeks* L. R. [1891] 2 Q. B. D. 31; *Western Union Tel. Co.* v. *Nye & Co.* (1903) 70 Neb. 251, and refuse to consider the fact that the plaintiff eventually recouped his loss, *Thomas Fruit Co.* v. *Start* (1895) 107 Cal. 206; *Brown* v. *Bigelow* (Mass. 1865) 10 Allen 242; *Hunt* v. *Van Deusen* (N. Y. 1887) 42 Hun 392, on the ground that to do so would lead to uncertainty and that damages, once defined, cannot be affected by collateral transactions fortuitous so far as the defendant is concerned. *Western Union Tel. Co.* v. *Nye & Co. supra; Brown* v. *Bigelow supra.* Since the appellants in the principal case were seeking the benefit of such a recoupment, the decision is a sound application of this general principle to a peculiar state of facts.

EJECTMENT—TENANTS IN COMMON—EXTENT OF RECOVERY.—The plaintiffs sued in ejectment to recover lands owned by them as tenants in common with others who were not represented in the action. *Held,* the plaintiff should recover the entire property, the recovery to enure to the benefit of all the tenants. *Hooper* v. *Bankhead & Bankhead* (Ala. 1911) 54 So. 549.

Although it is well settled that less than all the tenants in common may sue in ejectment, *Cruger* v. *McLaury* (1869) 41 N. Y. 219; *DeBergere* v. *Chaves* (N. M. 1908) 93 Pac. 762, the authorities are nearly equally divided as to the extent of recovery to be allowed in such cases. It is maintained on the one hand that as the plaintiff in ejectment must recover on the strength of his own title, see *Mobley* v. *Bruner* (1868) 59 Pa. St. 481, his recovery should be proportional thereto. *Dewey* v. *Brown* (Mass. 1824) 2 Pick. 387; *Doe d. Helyer* v. *King* (1851) 6 Ex. 791; *Gray* v. *Givens* (1858) 26 Mo. 291, 303. Where this doctrine obtains, unless all of the tenants join, each must sue for his aliquot part which he will hold in common with the disseisor until the latter is wholly evicted by their several suits. *Baber* v. *Henderson* (1900) 156 Mo. 566. This view is fortified by the historical argument that it was essential that the lessor, the real plaintiff, have capacity to make the fictitious lease upon which the old action of ejectment was predicated, *White* v. *Pickering* (Pa. 1816) 12 Serg. & R. 435, and a tenant in common could not by lease confer the right to occupy the entire premises. Freeman, Cotenancy (2nd ed.) § 220. On the other hand it is contended that, as a tenant in common is entitled to the whole property as against all persons except his cotenants, see *Mather* v. *Dunn* (1898) 11 S. D. 196, one or more of the cotenants may, therefore, properly sue for and recover the whole estate, the recovery to enure to the benefit of all the cotenants. *Johnson* v. *Tilden* (1833) 5 Vt. 426; *Allen* v. *Higgins* (1894) 9 Wash. 446; *Yancey* v. *Greenlee* (1884) 90 N. C. 317. The expedition and justice of this doctrine commends it in all cases except where the cotenants hold under different titles and where, therefore, a recovery by one is not a recognition of the rights of all. See *King* v. *Hyatt* (1893) 51 Kan.

504. This complication does not arise in the principal case, and in deciding it the court applied not only the preferable doctrine but that established by the authorities of its jurisdiction. *Lecroix* v. *Malone* (1908) 157 Ala. 439.

EQUITY—COVENANTS RUNNING WITH THE LAND—SPECIFIC PERFORMANCE. —Upon the sale of a part of his land to the grantor of the plaintiff, the defendant's grantor covenanted to supply the premises conveyed with power to be generated in a mill on the remaining land. The plaintiff sought to enforce the covenant against the defendant who was a purchaser with notice. *Held,* specific performance should be decreed. *Miller* v. *Clary et al.* (1911) 127 N. Y. Supp. 897.

Equity will take jurisdiction of covenants touching land although there be no privity, either of estate or of contract, between the parties. *Parker* v. *Nightingale* (Mass. 1863) 6 Allen 341. If the agreement show a clear intention to place a burden upon one parcel of land for the benefit of another, it binds all who take the covenantor's land with notice, regardless of whether the covenant would run at law. *Cooke* v. *Chilcott* (1876) L. R. 3 Ch. Div. 694; *Norcross* v. *James* (1885) 140 Mass. 188. The equity in the prayer of one who seeks the benefit of such a covenant against a purchaser with notice from the covenantor is to be found in the presumption that by force of the agreement the price of the land to be benefited was enhanced, while that of the burdened land was depreciated in proportion. *Renals* v. *Cowlishaw* (1875) 9 Ch. Div. 125; *Tulk* v. *Moxhay* (1848) 2 Phil. 774. To this must be attributed the development of the "equitable easement" which, in spite of its misleading characterization, is, in many respects, but the complement in chancery of covenants which run with the land at law. *Cf. Kirkpatrick* v. *Peshine* (1873) 24 N. J. Eq. 206; *Brouwer* v. *Jones* (N. Y. 1856) 23 Barb. 153. This consideration would seem to demand the enforcement of affirmative as well as of restrictive covenants to the extent of equity's power to compel specific performance. *Cooke* v. *Chilcott supra;* but see *Haywood* v. *Brunswick Building Society* (1881) L. R. 8 Q. B. Div. 403; 3 Pomeroy, Eq. Jur. (3rd ed.) § 689; 4 *id.* § 1295. It is commonly said, however, that only covenants of the latter kind will run with the land in equity, a view which has doubtless arisen from equity's reluctance to compel the performance of a continuous act. *Blackett* v. *Bates* (1865) L. R. 1 Ch. App. 117; *Ryan* v. *Mutual Chambers Association* L. R. [1893] 1 Ch. 116. The principal case is nevertheless illustrative of a growing tendency to enforce specifically covenants providing for the performance even of an active duty if it be certain and susceptible of supervision by the court. *Jones* v. *Parker* (1895) 163 Mass. 564; 10 COLUMBIA LAW REVIEW 574.

EQUITY—INTERPLEADER—MUNICIPALITIES CLAIMING TAXES.—The complainants, having been taxed varying amounts upon the same property by the defendant cities, brought a bill of interpleader against the several claimants. *Held,* the bill could not be maintained. *Welch et al.* v. *City of Boston et al.* (Mass. 1911) 94 N. E. 271.

While a bill of interpleader will lie though the complainant may be indirectly benefited by the outcome of the action, see *Oppenheim* v. *Wolf* (N. Y. 1846) 3 Sandf. Ch. 571, it is well settled that as to the *res* in controversy he must occupy the position of a mere stakeholder. *Wells, Fargo & Co.* v. *Miner* (1885) 25 Fed. 533. Having brought the

defendants into a court of equity to settle a dispute among themselves he cannot question the extent of his own liability. *Bridesburg Mfg. Co.'s Appeal* (1884) 106 Pa. St. 275. As a corollary, it follows that the claims of the defendants must be for the same thing, debt, or duty. *Byers* v. *Sansom-Thayer Com. Co.* (1904) 111 Ill. App. 575. This requirement would seem fatal where the facts are those of the principal case, but, nevertheless, it has been held in contradiction to the ordinary rules of interpleader that the action may be maintained when its object is to test the validity of tax assessments. *Thomson* v. *Ebbets* (N. Y. 1824) Hopkins Ch. 272; see *Redfield* v. *Supervisors* (N. Y. 1839) Clarke Ch. 42. In other jurisdictions a contrary rule prevails, though the result seems to have been reached largely through considerations of public policy. *Macy* v. *Nantucket* (1876) 121 Mass. 351; see *Forest River Lead Co.* v. *Salem* (1896) 165 Mass. 193; *Greene* v. *Mumford* (1856) 4 R. I. 313. The former view is objectionable since it would clearly be inequitable to force the claimant of the larger amount to interplead if the complainant pays into court only the smaller sum. *Smith* v. *Grand Lodge* (1907) 124 Mo. App. 181. On the other hand, if he pays in the larger, an anomalous situation arises if judgment be rendered for the defendant making the smaller claim, since the court would have a surplus on its hands which was due neither defendant and to which the plaintiff had renounced all interest. The decision of the principal case therefore accords with the orthodox view of interpleader.

EVIDENCE—HEARSAY RULE—NEIGHBORHOOD REPUTATION IN PEDIGREE CASES.—In an action of trespass to try title the issue was whether a child was born alive or dead. To support direct evidence the plaintiff sought to introduce the general reputation of the neighborhood that the child was born dead. *Held,* the evidence was admissible. *Wiess* v. *Hall* (Tex. 1911) 135 S. W. 384.

That the courts of a few jurisdictions receive neighborhood reputation in evidence in pedigree cases is due to the same necessity, *Pegram* v. *Isabell* (Va. 1808) 2 H. & M. 193; *Ewell* v. *State* (Tenn. 1834) 6 Yerg. 364; *Arens* v. *L. I. R. R. Co.* (1898) 156 N. Y. 1, to which must be attributed the more general exception to the hearsay rule whereby declarations of deceased members of the family and family tradition are admissible in like cases. See 1 Greenleaf, Evidence 197. Evidence of the former kind, however, has always been strictly scrutinized and only those facts which directly establish relationship or descent seem to be provable in this way. *Carter* v. *Montgomery* (1875) 2 Tenn. Ch. 216; *Pegram* v. *Isabell supra; Vaughan* v. *Phebe* (Tenn. 1827) M. & Y. 5. Thus, reputation as to birth or death may be given in evidence of descent, *Ringhouse* v. *Keever* (1869) 49 Ill. 470, while matters of detail such as place of birth or personal appearance may not be so proved. *Carter* v. *Montgomery supra; Brooks* v. *Clay* (Ky. 1821) 3 A. K. Marsh. 545. There seems to be no reason to doubt the probative force of rural tradition in regard to those facts of pedigree which are notorious or which a curious public have a tendency to investigate, *Gilliland* v. *Board of Education* (1906) 141 N. C. 482; *contra, Lamar* v. *Allen* (1899) 108 Ga. 158, but when public knowledge of a particular fact is improbable the reason for the rule fails and the evidence should be excluded. Since the issue in the principal case involved a fact of this kind, to permit its proof by neighborhood reputation is explicable only as an exercise of the broad discretion vested in a trial judge in such a

case. See 2 Wigmore, Evidence § 1605. However, if the evidence of reputation was otherwise competent, the introduction of direct evidence furnished no reason for its exclusion, for the necessity justifying its admission is not the necessity of a particular case. *Craufurd* v. *Blackburn* (1860) 17 Md. 49, 54; but see *Stegall* v. *Stegall's Adm'r* (U. S. 1825) 2 Brockenb. 256, 263. *Cf. Primm* v. *Stewart* (1851) 7 Tex. 178.

EXECUTORS AND ADMINISTRATORS—JURISDICTION—FOREIGN ADMINISTRATOR.—An administrator having taken out letters from a probate court of Tennessee obtained possession of a fund held by a bank of the State and removed it to Mississippi where he deposited it in his own name and subsequently squandered the entire amount. To a bill in equity filed against him and his bondsmen the defendant demurred on the ground that the court had no jurisdiction over him because he was a foreign administrator. *Held,* one judge dissenting, the court would take jurisdiction. *Cutrer* v. *State of Tennessee* (Miss. 1911) 54 So. 434. See Notes, p. 563.

FEDERAL PRACTICE—REMOVAL OF CAUSES—MANDAMUS.—A civil suit was removed to a Federal circuit court as presenting a separable controversy between citizens of different States, and upon refusal to remand to the state court, a motion for leave to file a petition for mandamus was made to the Supreme Court of the United States. *Held,* mandamus was not the proper remedy. *Ex parte Harding* (1911) 31 Sup. Ct. Rep. 324.

A writ of mandamus will issue to compel an inferior court to act on a matter within its jurisdiction, see *Ex parte Crane* (1831) 5 Pet. 190, but not to reverse its decision when made, *Ex parte Hoyt* (1839) 13 Pet. 279, for mandamus cannot be made to perform the functions of appeal, writ of error, or certiorari, *Bank of Columbia* v. *Sweeny* (1828) 1 Pet. 527, even though another remedy may involve an inconvenient delay. *Ex parte Conn. Mut. Life Ins. Co.* (1881) 26 Sup. Ct. Rep. 561. It would seem to follow that when a circuit court, having general jurisdiction of the subject matter and the parties, has denied a motion to remand, although erroneously, the decision cannot be reviewed by a petition for mandamus. *Ex parte Hoard* (1881) 105 U. S. 578. Where, however, the court is absolutely without jurisdiction in the premises and the aggrieved party would otherwise be remediless, mandamus may be invoked. Accordingly it has issued at the suit of a State to compel a Federal court to remand a criminal case under these circumstances. *Virginia* v. *Rives* (1897) 100 U. S. 313; *Virginia* v. *Paul* (1893) 148 U. S. 107. Indeed, through a misconception of the doctrine of the cases last cited and on the ground that other remedies were inadequate, mandamus has been granted in civil cases when the record disclosed that the Federal court was without actual jurisdiction, *Ex parte Wisner* (1906) 203 U. S. 449; *In re Winn* (1909) 213 U. S. 458, but this remedy has been consistently denied, where, as in the principal case, the record was not conclusive in this respect, *In re Pollitz* (1907) 206 U. S. 449; *Ex parte Nebraska* (1908) 209 U. S. 436, and the motion could have been refused upon this ground. However, to insure uniformity of practice, the court expressed its disapproval of *Ex parte Wisner supra* and *In re Winn supra,* in so far as they permit resort to mandamus when other remedies exist. It therefore seems that henceforth in no case may the refusal of a Federal court to remand a cause

in the exercise of its judicial discretion be reviewed except by the statutory provisions for the ultimate review of errors.

NEGLIGENCE—INTERVENING ACT—PROXIMATE CAUSE.—One of the defendants negligently permitted a team to run away, and as it was crossing the street in which the other defendant operated its street-cars, the plaintiff was injured in the collision that resulted from the negligence of the motorman. The court refused to instruct the jury that if the negligence of the railway company were found to be an independent, intervening cause, they should find for the moving-van company. *Held,* since the negligent acts concurred in producing the injury, the instruction was properly refused. *Miller* v. *United Rys. Co. of St. Louis et al.* (Mo. 1911) 134 S. W. 1045.

While the negligence of each of the defendants was of itself insufficient to cause the injury, this does not justify the conclusion that the causes were concurrent, Wharton, Negligence § 85, since the negligent acts did not concur in point of time. Cooley, Torts (3rd ed.) 123. The facts of the principal case therefore raise only the question of proximate cause. In order to fix liability for negligence, a direct line of causation must be established between the wrong and the injury, and the generally accepted test of causation is whether the latter is the natural and probable consequence of the former. *McDonald* v. *Snelling* (Mass. 1867) 14 Allen 290. When, however, an independent, efficient cause intervenes subsequently to the primary negligent act, the chain of causation is severed, *Pullman Palace Car Co.* v. *Laack* (1892) 143 Ill. 242, and this is especially apparent in the case of the interposition of a responsible human agency. *Nickey* v. *Steuder* (1905) 164 Ind. 189; Wharton, Negligence § 134. The soundness of these principles is clear since the criterion of remoteness is not the number of intervening causes but their efficiency as conductors to the original act, *McDonald* v. *Snelling supra,* and nothing is better calculated to cut off this connection than the intervention of human volition. However, the line of causation is not broken if the intervening event might reasonably have been foreseen. *Southern Ry. Co.* v. *Webb* (1902) 116 Ga. 152; *Pullman Palace Car Co.* v. *Laack supra.* It would therefore seem that the principal case may be supported only on the ground that the instruction requested did not adequately present the question of reasonable foresight.

NEGOTIABLE INSTRUMENTS—INDORSER'S LIABILITY—EFFECT OF INDEMNITY UPON NECESSITY OF DEMAND AND NOTICE.—The decedent and other directors of a corporation indorsed the company's notes for its accommodation, accepting the benefit of a trust deed of all the company's property for the sole purpose of indemnity. In an action upon the indorsement demand and notice were not proved. *Held,* under the circumstances demand and notice were unnecessary. *In re Alldred's Estate* (Pa. 1911) 79 Atl. 14.

Whether the receipt by an indorser of the assets of the maker of a promissory note dispenses with the necessity of demand and notice has been held to depend upon their character and sufficiency, *Bank* v. *McGuire* (1877) 33 Oh. St. 295, but neither of these considerations should be controlling, for the contract of an indorser is to pay only after demand and notice. *Musson* v. *Lake* (1846) 4 How. 262. Therefore, the ultimate question in every case where demand and notice are lacking is whether the indorser has bound himself

by a different contract, or has waived the condition in his contract of indorsement. Thus, when the indorser assumes the primary obligation of the maker, by receiving funds under an agreement to pay the note when due, he has imposed upon himself the obligations of a new contract which is unconditional. *Bond* v. *Farnham* (1809) 5 Mass. 170; *Mechanics' Bank* v. *Griswold* (N. Y. 1831) 7 Wend. 165; *Kramer* v. *Sanford* (Pa. 1842) 4 W. & S. 328. But when the assets of the maker, either in whole or in part, are assigned by mortgage, *Moses* v. *Ela* (1862) 43 N. H. 557, or by a trust deed, *Creamer* v. *Perry* (Mass. 1835) 17 Pick. 336, or otherwise, *Ray* v. *Smith* (1873) 17 Wall. 411, solely as indemnity, the nature of the transaction precludes any suggestion of an intention on the part of the indorser to become primarily liable, or to waive the condition in his contract of indorsement. *Whittier* v. *Collins* (1885) 15 R. I. 44; *Selby's Adm'r* v. *Brinkley* (Tenn. 1875) 17 S. W. 479. Nor should it make any difference that the indorser is a director of the company making the note. *McDonald* v. *Luckenbach* (1909) 170 Fed. 434; *cf. Hull* v. *Myers* (1892) 90 Ga. 674. A failure to observe this difference has often led to the conclusion reached in the principal case, but such a result is not in accord with the weight of authority, nor is it supported by the provisions of the Negotiable Instruments Law which has been enacted in Pennsylvania. Laws of 1901, p. 194, §§ 108, 115.

NEGOTIABLE INSTRUMENTS—PAYMENT OF FORGED DRAFT BY DRAWEE—LIABILITY OF DRAWER.—The plaintiff, who purchased from the defendant bank a draft on another bank, was refused payment by the drawee after it had paid the amount of the draft on a forged endorsement of the payee. *Held,* the defendant was liable on the paper. *Sims et al.* v. *American Nat. Bank* (Ark. 1911) 135 S. W. 356.

Although the early construction of the Hamburgh Ordinance, which provided that an acceptance of a bill of exchange could not be revoked, was not uniform, see *Thornton* v. *Dick* (1803) 4 Esp. 270; *Bentinck* v. *Dorrien* (1805) 6 East 199, it has long been held that communication of the acceptance to the holder of the bill is necessary to bind the acceptor, *Cox* v. *Troy* (1822) 5 B. & Ald. 474, and this rule of the law merchant has been embodied in the Negotiable Instruments Law. See Crawford, Negotiable Instruments Law § 2. The acceptance, moreover, must be of such a nature as to produce a contract between the acceptor and the holder. *Harris* v. *Clark* (1849) 3 N. Y. 93. Without the privity of contract thus established the holder of a draft is remediless against the drawee, *Dickinson* v. *Coates* (1883) 79 Mo. 250; *Grammel* v. *Carmer* (1884) 55 Mich. 201; *contra, Fogarties* v. *State Bank* (S. C. 1860) 12 Rich. 518, for neither a check nor a draft operates as an equitable assignment of the drawer's balance. See 2 COLUMBIA LAW REVIEW 171; but see Morse, Banks and Banking § 496. Inasmuch as payment on a forged endorsement fails utterly to meet the requirements of an acceptance, since it cannot be construed as a promise to pay, but merely as evidence of the drawee's willingness to apply the drawer's funds to the satisfaction of the latter's demands, the drawee in the principal case incurred no liability to the plaintiff. The court, therefore, rightly held the defendant bound to pay the amount of its dishonored draft. *First Nat. Bank* v. *Whitman* (1876) 94 U. S. 343; *Bank of the Republic* v. *Millard* (1869) 10 Wall. 152. But see *Seventh Nat. Bank* v. *Cook* (1873) 73 Pa. St. 483; Morse, Banks & Banking § 474.

PERSONAL RIGHTS—RIGHT OF PRIVACY—IMMUNITY FROM WRONGFUL PUBLICITY.—The plaintiff's picture was published without his consent for advertising purposes, and he sued for damages for the invasion of his right of privacy. *Held,* the complaint stated a good cause of action. *Munden* v. *Harris* (Mo. 1911) 134 S. W. 1076. See Notes, p. 566.

PLEADING AND PRACTICE—AMENDMENTS—STATUTE OF LIMITATIONS.—The plaintiff's declaration did not allege facts sufficient to constitute a cause of action. After the period of limitations had elapsed, by an amendment a cause of action was set forth. The defendant thereupon pleaded the Statute of Limitations. *Held,* the plaintiff could recover. *Bourdreaux* v. *Tuscon Gas, Electric Light & Power Co.* (Ariz. 1911) 114 Pac. 54.

The liberality with which amendments are to-day allowed becomes objectionable only when the rights of the opposing party are thereby prejudiced. For example, the defendant should not be deprived of a defence which the Statute of Limitations would otherwise afford by allowing the plaintiff to introduce a new cause of action, *Weldon* v. *Neal* (1887) L. R. 19 Q. B. D. 394, to change the nature of his claim, *Hamilton* v. *Thirston* (1902) 94 Md. 253, or to add a necessary party to the action, *Willink* v. *Renwick* (N. Y. 1840) 22 Wend. 608, under the guise of an amendment to his complaint. Accordingly, when leave to amend is given in these cases it will not defeat the right of the defendant to plead the Statute of Limitations. *Anderson* v. *R. R. Co.* (1905) 71 Kan. 453; *Wilson's Adm'r* v. *Holt* (1890) 91 Ala. 204. Rules of practice differ, however, where the complaint fails to state a cause of action and leave to amend is sought after the expiration of the period of limitations. Upon the theory that the cause of action latently accompanies the inherently defective complaint the amendment is commonly allowed as of the time when suit was commenced. *J. M. & I. R. R. Co.* v. *Hendrick's Adm'r* (1872) 41 Ind. 48; *Lassiter* v. *R. R. Co.* (1904) 136 N. C. 89. The soundness of this reasoning, which is that of the principal case, is technically questionable since there appears to be no logical distinction between amending so as to add a new cause of action and amending so as to state a cause of action for the first time. *Powers* v. *Badger Lumber Co.* (1907) 75 Kan. 687; *Foster* v. *St. Luke's Hospital* (1901) 191 Ill. 94. However, from the broader point of view characteristic of modern procedure the decision is eminently satisfactory, for notwithstanding that a complaint lacks an essential allegation, an action has nevertheless been commenced within the meaning of the Statute, and its purpose is therefore not defeated by amendments which do no more than cure defects in the statement of the cause of action.

POWERS—CONSTRUCTION—LIFE ESTATE WITH POWER OF DISPOSAL.—A testator devised the residue of his real and personal property to his wife "for life," with a general power of disposal of the remainder. *Held,* the wife took a fee simple. *Ironside* v. *Ironside* (Ia. 1911) 130 N. W. 414.

In case of a devise of property generally, without a clear definition of the quality of the estate, the donee takes a fee simple which is not affected by a superadded power, on the theory that the latter gift is repugnant to the former. *In re Hutchinson and Tenant* (1878) L. R. 8 Ch. Div. 540. However, when a life estate is expressly given, as in the principal case, by the weight of authority such a gift is not

enlarged by a power to dispose of the fee; *Tomlinson* v. *Dighton* (1711) 1 P. Wms. 149; see *Borden* v. *Downey* (1871) 35 N. J. L. 74; *contra, May* v. *Joynes* (Va. 1857) 20 Gratt. 692; and this seems a logical result, since the power in itself gives rise to no estate, but simply to a right to divest the estate of another. See *Burleigh* v. *Clough* (1872) 52 N. H. 267. Nor would there seem to be any force in the contention that in order to appoint a fee the donee of the power must be seized of a fee, *May* v. *Joynes supra,* since it is clear that the power is something apart from ownership. *Burleigh* v. *Clough supra.* In conformity with the general regard for the intention of the testator these settled rules of construction do not apply when there is an unequivocal expression of his intention to the contrary. *Doe* v. *Thomas* (1835) 3 A. & E. 123. From the facts of the principal case it is very difficult to find any indication of an intention to enlarge the life estate, other than the clause creating the power; and as this affords no such evidence, the decision is opposed to all generally accepted rules of construction. Nevertheless, since the result reached has been attained by legislation in many States, it would seem that it may be regarded as a desirable one. N. Y. Consol. L. ch. 50, § 151; see Fowler, Real Prop. 632, 633.

STATUTE OF FRAUDS—CONTRACT FOR THE SALE OF AN INTEREST IN LAND—PARTY TO BE CHARGED.—The plaintiff orally agreed with the defendant to assign to the latter a contract for the purchase of certain real estate and he subsequently made the assignment in writing. To an action on his promise the defendant pleaded the Statute of Frauds, which prohibits suit on an agreement for the sale of an interest in land unless it is evidenced by a writing signed by the party to be charged. *Held,* the plaintiff could recover. *Evans* v. *Stratton* (Ky. 1911) 134 S. W. 1154.

Since a contract for the sale of land passes an equitable interest in the land and equitable interests are within the Statute of Frauds, 11 COLUMBIA LAW REVIEW 386, a parol contract for the assignment of the purchaser's interest falls within the provision of the Statute pleaded in the principal case, *Esslinger* v. *Pascoe* (1905) 129 Ia. 86; see *Hackett* v. *Watts* (1897) 138 Mo. 502, and its validity as a defence therefore depended upon the meaning of the words "party to be charged." Under the construction which proceeds upon the theory that the purpose of this section is solely the protection of land-owners the vendor is the party to be charged and his signature alone is necessary. *Moore* v. *Chenault* (Ky. 1895) 29 S. W. 140; *Lowry* v. *Mehaffy* (Pa. 1840) 10 Watts 387. The preferable interpretation of the phrase, which is that given it in the analogous section relating to chattels, is that the party to be charged is the one against whom the contract is sought to be enforced. *Miller* v. *Monazite Co.* (1910) 152 N. C. 608; *Harper* v. *Goldschmidt* (1909) 156 Cal. 245. The vendor is thus guarded from fraud if the action be against him and, what appears of equal importance, the vendee is not without protection. *Hall* v. *Misenheimer* (1904) 137 N. C. 183. This interpretation is further desirable since it prevents the injustice of allowing a vendee to avoid his contract though he has evidenced his acceptance in writing. *City of Murray* v. *Crawford* (1910) 138 Ky. 25. The erroneous view seems to have arisen from following the decisions of jurisdictions where the statutes expressly require that the memorandum be signed by the vendor, see *Harper* v. *Goldschmidt supra; Moore* v. *Powell* (1894) 6 Tex. Civ. App. 43, but since there is no such statute in Kentucky, the result reached in the principal case seems an unfortunate one.

TAXATION—VALUATION OF SPECIAL FRANCHISE—INCOMPLETE RAILWAY SYSTEM.—Under the tax law (N. Y. Consol. L. c. 62, § 2, subd. 3) which provides that a special franchise shall be deemed to include the value of the tangible as well as the intangible property, the relator's special franchises were assessed an amount in excess of the cost of reproducing its tangible property. A part of relator's lines was not completed or in operation. *Held,* two judges dissenting, the valuation was fair. *People ex rel. Hudson & M. R. R. Co.* v. *State Board of Tax Com'rs et al.* (1911) 127 N. Y. Supp. 918.

Since a special franchise is to be assessed in the same manner as other property, so far as its nature permits, actual value and not cost is the true basis for taxation. *People ex rel.* v. *Tax Com'rs* (N. Y. 1908) 128 App. Div. 13. Because of the legislature's failure to supply a definite rule of valuation, such assessments are variously made in New York according to the applicability of a given method to a given case. See 10 COLUMBIA LAW REVIEW 158. For example, while a consideration of net earnings may be important and in some instances determinative, in other cases this method would be unreliable. See *People ex rel.* v. *Tax Com'rs* (1909) 196 N.Y. 39. In like manner the cost of reproduction or the scrap value of the tangible property is not conclusive. *People ex rel.* v. *Barker* (N. Y. 1896) 7 App. Div. 27, aff'd 151 N. Y. 639; see *People ex rel.* v. *Tax Com'rs* (1903) 174 N. Y. 417, 441. Future earnings and prospective improvement in commercial conditions, so certain as to control a *bona fide* market, may be considered by the taxing power, *Trustees Cincinnati So. Ry.* v. *Guenther* (1884) 19 Fed. 395, 399; *Central R. R. Co.* v. *State Board of Assessors* (1886) 49 N. J. L. 1; *State* v. *V. & T. R. R. Co.* (1896) 23 Nev. 283, although this should be done cautiously. See *State* v. *Illinois Central R. R. Co.* (1861) 27 Ill. 64. Moreover, the mere fact that a road is not in operation does not of itself show that the intangible property is worthless, but if large sums are being expended to prepare it for use the natural conclusion is that this privilege is valuable. Conceding, therefore, that the valuation of this right whose earning power has not yet been tested is difficult, it by no means follows that it should not be undertaken. *People ex rel.* v. *State Board of Tax Com'rs* (1911) 126 N. Y. 1063. Especially is this true where as in the principal case the franchise is in the possession of a going concern.

TRUSTS—DEFINITENESS OF SUBJECT-MATTER AND OBJECTS—TRUSTS IN PART CHARITABLE.—A testator directed his property to be funded, the interest and, if necessary, the *corpus* of the fund to be used in paying certain annuities, and thereafter the remainder to be paid to the testator's brothers and sisters in need thereof as to the trustees might seem best, and to certain charitable objects. *Held,* the trust was void for uncertainty of subject-matter and of objects. *Wilce* v. *Van Anden* (Ill. 1911) 94 N. W. 42. See Notes, p. 559.

TRUSTS—PRIORITY OF EQUITIES—GOOD CONSCIENCE AS THE DETERMINING FACTOR.—A company deposited money, which it held in trust for the plaintiff bank, in its individual deposit account with the defendant bank, giving no notice of the trust relation. Subsequently, after notice and demand, the defendant refused to satisfy the plaintiff's claim, but later applied the money in payment of notes on which the depositor company was indebted to the defendant and which were over due at the time of the deposit of the trust fund. *Held,* the plaintiff could recover. *First Nat. Bank of Auburn* v. *The Eastern Trust & Banking Co.* (Me. 1911) 79 Atl. 4. See Notes, p. 554.

WILLS—ELECTION—COMPENSATION TO DISAPPOINTED LEGATEE.—The plaintiff devisees, by instituting partition proceedings, elected to retain an estate belonging to them which the will purported to bestow upon the defendant. *Held,* although the recusant donees did not forfeit their gift, equity would force them to compensate the disappointed legatees therefrom. *Cooley et al.* v. *Houston et al.* (Pa. 1911) 78 Atl. 1129.

That one who elects to accept a bequest thereby renounces every right inconsistent with the will is a well established principle of equity, see *Hyde* v. *Baldwin* (Mass. 1835) 17 Pick. 303, which has also been applied at law. *Smith* v. *Smith* (Mass. 1860) 14 Gray 532. But when a devisee elects against the will, the early decisions are conflicting as to whether he thereby forfeits his legacy entirely, *Pugh* v. *Smith* (1740) 2 Atk. 43; *McGinnis* v. *McGinnis* (1846) 1 Ga. 496, or only so far as is necessary to give the other donees an estate equivalent to that of which his election has deprived them. *Anon.* (1708) Gilb. Eq. 15; see *Marriott* v. *Badger* (1854) 5 Md. 306. If the true basis of the doctrine of election is the intention of the testator, see note to *Dillon* v. *Parker* (1818) 1 Swanst. 359, 393, the determination of this question would depend upon what the courts might find his intention to be. However, where the testator erroneously supposes the subject of the gift to be his own, to say that he intended to make a conditional or alternative bequest is to indulge in fiction. 1 Pomeroy, Eq. Jur. § 464. A sounder basis for this doctrine is that it would not be in keeping with good conscience that one should accept the benefits of a will and at the same time defeat the testator's wishes as to the other donees. Therefore, under such circumstances equity will impose upon the recusant legatee the obligation to apply his legacy in carrying out the will of the testator. See *Farmington Savings Bank* v. *Curran* (1899) 72 Conn. 342. After this has been done, however, if a surplus remains, see *Lewis* v. *Lewis* (1850) 13 Pa. St. 79, there is nothing inequitable in allowing the refractory donee to retain it, see note to *Gretton* v. *Haward* (1818) 1 Swanst. 408, 433, and in so deciding it is evident that the court in the principal case reached a result manifestly sound. *Rogers* v. *Jones* (1876) L. R. 3 Ch. Div. 688; see *Wilbanks* v. *Wilbanks* (1856) 18 Ill. 17.

WILLS—RESIDUE OF A RESIDUE—INTESTACY.—The testator made several bequests of varying sums in trust for M., C. and I., and then bequeathed the residue of his property to the same persons, to take shares proportionate to their legacies. By a codicil W. and J. were given legacies and were also made *pro rata* residuary legatees. W. and J. predeceased the testator. *Held,* there was an intestacy as to their shares. *In re Hoffman* (N. Y. 1911) 44 N. Y. L. J. No. 149.

It has long been established that a failure of a share of the residue, creating a residue of a residue, gives rise to an intestacy as to that share, *Beekman* v. *Bonsor* (1861) 23 N. Y. 298, the theory being that the testator, having bequeathed a definite amount to each residuary legatee, cannot intend that he take more. It is clear that the addition of the words "with survivorship" would make a class of the residuary legatees, 2 Jarman, Wills (6th Eng. ed.) 1059, and that any other conclusion than that of intestacy would give the legatees the privileges of class membership. Although modern decisions accept the general rule of construction and assume that it is the intention of the testator

that the failure of a share of the residue shall give rise to an intestacy, the assiduity with which the courts seek expressions in a will, even remotely indicating an intention to the contrary, suggests that the assumption is often contrary to fact, if not, indeed, that the rule itself is based on a misconception of the testator's desire. See *Skrymsher* v. *Northcote* (1818) 1 Swanst. 565; *Humble* v. *Shore* (1847) 7 Hare 247. Thus, when there is a gift over, *In re Parker* L. R. [1901] 1 Ch. 408, or a revocation of one of the residuary shares, *Harris* v. *Davis* (1844) 1 Coll. Ch. 416, intestacy will not be the result. This tendency to regard the testator's intention is unquestionably a proper one in this class of cases, for there is here no rule of feudal tenure to operate to defeat intention as in the case of contingent remainders and executory devises. *White* v. *Summers* L. R. [1908] 2 Ch. 256. However, it has not become of sufficient strength to impair the applicability of the rule to the facts of the principal case. Hence, while the decision was inevitable on authority, it would seem that there is room for a difference of opinion as to the soundness of attributing to a testator the intention of intestacy. 2 Roper, Legacies 1726; *cf. In re Parker supra.*

WITNESSES—EXPERTS—COMPENSATION.—The respondent in disbarment proceedings had contracted with a physician to pay him a portion of the recovery if he would testify in an action which the respondent was conducting. *Held,* the contract was void and for his unprofessional conduct in making it the respondent should be disbarred. *In the Matter of Shapiro* (N. Y. 1911) 45 N. Y. L. J. No. 18.

Although witnesses have been denied the right to extra compensation on the ground of public policy, this result may be as well sustained on the principle that the performance of a legal duty is not a valid consideration for a contract. An application of the same principle would dissipate much of the apparent confusion as to the right of expert witnesses to compensation. See *Collins* v. *Godefroy* (1831) 1 B. & Ad. 950. Thus, of course, an expert like any other citizen may be called upon to testify to facts although they fell within his observation while in the course of practicing his profession, *Le Mere* v. *McHale* (1883) 30 Minn. 410, and if he is asked merely for his professional opinion on a given state of facts, that his scientific knowledge makes him competent to testify to such matters should not alone entitle him to more than the statutory fees. *Burnett* v. *Freeman* (1907) 125 Mo. App. 683; *Ex Parte Dement* (1875) 53 Ala. 389; *Dixon* v. *People* (1897) 168 Ill. 179; *contra, Buchanan* v. *State* (1877) 59 Ind. 1; *cf. Dills* v. *State* (1877) 59 Ind. 15. On the other hand, if the witness agrees to render service beyond this duty, such as to appear without a subpœna, *Barrus* v. *Phaneuf* (1896) 166 Mass. 123; *Armstrong* v. *Prentice* (1893) 86 Wis. 210, or to fit himself to testify, *Lincoln Mining Co.* v. *Williams* (1906) 37 Colo. 193; *Summers* v. *State* (1879) 5 Tex. Ct. App. 365, or even to attend a trial to consider the evidence upon which he is to give his opinion, see *People* v. *Montgomery* (N Y. 1872) 13 Abb. Pr. [N. S.] 207, 240, such circumstances furnish a good consideration and the contract will accordingly be valid. Considerations of public policy do, however, become vital when, as in the principal case, the amount of compensation is made to depend on the outcome of the suit. That the effect of such agreements is likely to be subversive of justice is clear, and they should not only be unenforceable, *Pollak* v. *Gregory* (1861) 9 Bosw. 116; *Dawkins* v. *Gill* (1846) 10 Ala. 206, but may well be considered grounds for disbarment, if made by an attorney.